175 No. 10-517 (2)

IN THE
Supreme Court of the United States

Supreme Court, U.S.
FILED
NOV 17 2010
OFFICE OF THE CLERK

INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF AMICI CURIAE OF THE JEWISH SOCIAL POLICY ACTION NETWORK, THE CAPUCHIN FRANCISCAN FRIARS OF THE PENNSYLVANIA PROVINCE, LUTHERAN CHILDREN AND FAMILY SERVICE OF EASTERN PENNSYLVANIA, THE PITTSBURGH AREA JEWISH COMMITTEE, HIAS AND COUNCIL MIGRATION SERVICE OF PHILADELPHIA, THE SHALOM CENTER, AND THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA IN SUPPORT OF PETITIONER

JUDAH I. LABOVITZ
Of counsel
1717 ARCH STREET
SUITE 4130
PHILADELPHIA, PA
19103

JEFFREY I. PASEK
Counsel of record
RACHEL S. FENDELL
COZEN O'CONNOR
1900 MARKET STREET
PHILADELPHIA, PA 19103
(215) 665-2000
Jpasek@cozen.com
Counsel for Amici Curiae

QUESTION PRESENTED

Must a noncitizen who has complied with an order to depart be afforded her right, under 8 U.S.C. § 1229a(c)(7)(A), to have her single, timely motion to reopen considered on its merits, notwithstanding 8 C.F.R. § 1003.2(d)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

BACKGROUND 4

ARGUMENT 5

I. THE PETITION FOR CERTIORARI CONCERNS HUMAN RIGHTS ISSUES OF SIGNIFICANT IMPORTANCE. 5

A. The United States Plays a Vital Role in Preventing Religious Persecution and Protecting Its Victims. 5

B. This Court Should Resolve an Issue that Affects All Refugees in This Country. 10

II. THE CIRCUIT SPLIT HAS CREATED PRACTICAL CONSEQUENCES THAT REQUIRE THIS COURT'S RESOLUTION 11

III. THE TENTH CIRCUIT'S READING OF THE REGULATIONS PRODUCES ILLOGICAL CONSEQUENCES. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Castro-O'Ryan v. U.S. Dep't of Imm. & Naturalization,
847 F.2d 1307 (9th Cir. 1988) 12

Drax v. Reno,
338 F.3d 98 (2d Cir. 2003) 12

Pleasant Grove City v. Summum,
129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) 1

Salazar v. Buono,
130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010) 1

STATUTES

8 U.S.C.
§ 1158(B)(i) (2006) 8
§ 1182(a)(6), (9) (2006) 13
§ 1229a (2006) 14

22 U.S.C.
§ 6401(a)(1) (2006) 6
§ 6401(b)(3) (2006) 7
§ 6431 (2006) 9
§ 6433 (2006) 9
§§ 6401-6450 (2006) 5

OTHER AUTHORITIES

8 C.F.R. § 1003.2 (2006) 13

144 CONG. REC. S 12091 (1998) (statement of Sen. Ashcroft) 6

144 CONG. REC. S 12091 (1998) (statement of Sen. Biden) 6

144 CONG. REC. S 12091 (1998) (statement of Sen. Feingold) 6

144 CONG. REC. S 12091 (1998) (statement of Sen. Hatch) 6

144 CONG. REC. S 11907 (1998) (statement of Sen. Lieberman) 7

144 CONG. REC. S 11907 (1998) (statement of Sen. Specter) 5

U.S. Dep't of Homeland Security, 2009 Yearbook of Immigration Statistics (2010) 8, 12

United States Commission on International Religious Freedom, *available at* http://www.uscirf.gov/about-uscirf.html. 9

United States Commission on International Religious Freedom, Annual Report 2010, *available at* http://www.uscirf.gov/images/annual%20report%202010.pdf 10

U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010) 8, 9, 10,11

INTERESTS OF *AMICI CURIAE*

The Jewish Social Policy Action Network ("JSPAN") is an organization of American Jews that works to protect the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. Our religious tradition teaches us not to oppress the stranger living in our midst for we were once strangers in the land of Egypt. Exod. 23:9. Molded by a 1500 year experience of living as a minority in Christendom and in Islamic societies, American Jews are keenly aware that religious persecution persists. Our interest in this case stems from the desire to assure that those who seek asylum in America may have their cases decided without being forced to go into hiding. As an organization, JSPAN in recent years has authored *amici* briefs in this Court in *Salazar v. Buono*, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010), and *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009), and participated in numerous amici briefs before the lower federal courts.[1]

The Capuchin Franciscan Friars of the Pennsylvania Province are a branch of the Catholic religious Order founded by Saint Francis of Assisi. Saint Francis began a religious Order of priests and brothers to live in humility and to serve

---

[1] Counsel of record for all parties received notice at least ten days before the due date of *amici curiae*'s intention to file this brief. Their letters of consent are filed with this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

the poor, the outcasts, and those shunned by society. In recent years, the Capuchins of North America have worked with many immigrants to the United States, offering spiritual and other forms of assistance. In fact, a number of our younger brothers are themselves immigrants.

The Lutheran Children and Family Service of Eastern Pennsylvania is a human service agency that has been dedicated to protecting and empowering vulnerable children and families since its founding in 1922. Working in close partnership with public institutions and faith-based and non-sectarian community organizations throughout the region, LCFS serves over 4,000 clients region-wide without regard to race, religion, national origin, ancestry, gender, disability, age, or sexual orientation. As an affiliate of the national Lutheran Immigration and Refugee Service and as a social ministry organization affiliated with both the Evangelical Lutheran Church in America as well as the Lutheran Church Missouri Synod, we rejoice that our church and country continue to change with the steady arrival of newcomers in the United States who are enriching congregations and communities. We believe in the Biblical mandate to "welcome the stranger."

The Pittsburgh Area Jewish Committee (PAJC), an independent affiliate of the American Jewish Committee, seeks a pluralistic society wherein the rights and dignity of the Jewish people as well as all other religious, cultural, and racial groups are respected and secure. We work hard to insure that the American dream is true for everyone

realizing that we can only secure our rights as American Jews if those rights are afforded to others.

HIAS and Council Migration Service of Philadelphia, a partner agency of the Jewish Federation of Greater Philadelphia, provides legal and social services to a diverse group of 2,000 immigrants and refugees annually. Since our founding in 1882, we have assisted over 300,000 immigrants in our region. We are a non-profit faith-based organization which seeks, through representation, to avoid unjust deportations so that families are preserved, individuals are afforded basic due process protections, and noncitizens are protected from persecution and torture pursuant to international and national human rights law. In the past five years, we have represented scores of individuals before the U.S. Immigration Court, the Board of Immigration Appeals and the federal courts.

The Shalom Center was founded in 1983, bringing wisdom from the Jewish tradition to bear on issues of peace, social justice, and healing of the earth. We have about 3,000 members across the United States and our e-mail lists reach an additional 19,000 people.

The World Organization for Human Rights USA ("Human Rights USA") is a non-profit human rights organization that employs legal strategies to ensure that U.S. law upholds internationally-recognized human rights standards, obtains justice for victims of human rights violations, and punishes the violators. Human Rights USA focuses primarily

on the United States' compliance with international human rights norms, using litigation as the primary tool for securing compliance and for bringing public attention to these problems. Human Rights USA is a member of the World Organization Against Torture, an international network of 297 human rights groups working to protect human rights in their own countries.

BACKGROUND

The Board of Immigration Appeals' categorical bar of motions to reopen or reconsider by aliens no longer in the United States applies to all manner of immigration claims, and the issues raised are of paramount importance to the faith community because of the effects on asylum seekers. The lower court's decision will have harmful ramifications by barring the door to noncitizens who have legitimate claims of religious persecution. As organizations committed to upholding the rule of law of the land, *amici* oppose a rule that closes off avenues of adjudication such as reopening and reconsideration. The regulation at issue effectively asks noncitizens to go into hiding and violate the law in order to preserve their ability to have their cases fully adjudicated. Perversely, refugees who comply with a voluntary-departure order forfeit their right to seek reopening or reconsideration of erroneous removals. An asylum seeker should not be put to this choice. Honoring the law should not come at the cost of forfeiture, and violating the law should not aid in one's legal pursuit of asylum.

ARGUMENT

I. THE PETITION FOR CERTIORARI CONCERNS HUMAN RIGHTS ISSUES OF SIGNIFICANT IMPORTANCE.

A. The United States Plays a Vital Role in Preventing Religious Persecution and Protecting Its Victims.

For hundreds of years America has been a safe haven from religious persecution. Many members of the religions represented by the parties to this brief entered the United States seeking refuge from religious persecution. These religious groups maintain a keen interest in ensuring that victims of religious persecution can continue to seek refuge in the United States.

Grounded in the United States Constitution, the free exercise of religion is of the upmost importance in the United States. Religious freedom is the "rockbed" of this country. 144 CONG. REC. S 11907 (1998) (statement of Sen. Specter). It is the reason that the Pilgrims arrived in the United States in the 1600s, and it is one of the mechanisms through which this country grows and develops. *Id.*

In the enactment of the International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401-6450 (2006), Congress focused on the importance of religious freedom in the United States:

> The right to freedom of religion undergirds the very origin and existence of the United States. Many of our

> Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution. 22 U.S.C. § 6401(a)(1) (2006).

Legislators on both sides of the political spectrum acknowledged the critical need to prevent religious persecution, and protect those subject to such persecution. *See* 144 CONG. REC. S 12091 (1998) (statement of Sen. Ashcroft) (noting that passage of the International Religious Freedom Act was vital because "the United States has a duty to stand for religious liberty abroad as we continue to preserve it at home."); 144 CONG. REC. S 12091 (1998) (statement of Sen. Hatch) (stating that the Act "conscientiously fulfills the Congress's intent to act against one of the most hideous violations of human rights, persecution based on faith."); 144 CONG. REC. S 12091 (1998) (statement of Sen. Feingold) (recognizing the importance of protecting against not only religious persecution, but also other types of persecution faced by others in the world); 144 CONG. REC. S 12091 (1998) (statement of Sen. Biden) (hoping that the Act would "lead to advancement of religious freedom—one of the fundamental human rights—around the world."). Collectively, Congress again reiterated its

ongoing effort to reflect the "unwavering commitment of the United States to religious freedom . . . ." 22 U.S.C. § 6401(b)(3) (2006).

When the Senate passed the Act, Senator Joseph Lieberman shared a poignant story:

> On this day, I think of my grandmother who came here from Central Europe. My grandmother was probably one of the greatest American patriots I ever knew, for a simple reason: She said to me in her old age how much she loved the country. She said, "It may not seem that profound to you, it may not seem that complicated, but the fact I can walk to synagogue on Saturday morning and not only is no one harassing me or bothering me, not only do I live free of fear, not only do I have no hesitation about what I will find in the synagogue, nobody bothering the building or any of us worshipping there, but my neighbors who are not Jewish, as they see me, say "Good morning, Mrs. Manger, good Sabbath to you.'" 144 CONG. REC. S 12091 (1998).

The protection afforded by the United States has similarly affected millions of citizens, and millions more of their ancestors. Because the United States is a place of refuge, millions are able to freely practice their religions, freely display their political affiliations, and freely associate without fear of persecution. The United States' role as a safe haven from all forms of persecution even predates the

Constitution and is central to the nation's identity. It is one of the reasons that America remains exceptional among nations.

Receiving a grant of asylum is neither easy nor guaranteed. In addition to the requirements imposed by statute, refugees must gather evidence that can be difficult to locate and survive in a system that is difficult to navigate even without a language barrier. 8 U.S.C. § 1158(B)(i) (2006) (discussing burden of proof to establish an asylum claim). Despite these hurdles, in 2009, officials granted 47% of all defensive asylum claims, up from 38% in 2005. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). For those filing for affirmative asylum in an immigration court, the 2009 grant rate was 55%, compared to 44% in 2005. *Id.* Over 20,000 individuals have been granted asylum since 1995. Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2009 Yearbook of Immigration Statistics (2010). However, the high ratio of asylum grants is no coincidence—refugees often *do* have legitimate bases upon which to seek refugee status and legally remain in the United States.

The availability of asylum as a tool to prevent religious persecution is of great importance to *amici*. The Petitioner, Indah Estalita, arrived in the United States from Indonesia. As a Christian, she feared religious persecution in a predominantly Muslim country. Although Estalita's first asylum claim was denied, when she reentered the country, immigration officers determined that her fears of persecution were credible and granted her entry to the United States pending a determination of her asylum claim. Indonesia consistently ranks among the top-25

countries for grants of asylum. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). Although asylum may not be the sole basis for Petitioner's request to remain in the United States, the same legal issues would be presented to this Court were she seeking religious asylum or adjustment on other grounds. Resolution of this issue now is hence important for *amici* and the communities they serve.

The United States is at the forefront in the fight against religious persecution. In 1998, with the enactment of the International Religious Freedom Act, Congress created the United States Commission on International Religious Freedom. 22 U.S.C. § 6431 (2006). The Commission is a bi-partisan effort charged with reviewing "the facts and circumstances of violations of religious freedom internationally" and making "policy recommendations to the President, Secretary of State and Congress." United States Commission on International Religious Freedom, *available at* http://www.uscirf.gov/about-uscirf.html.

In addition to other roles, the Commission publishes a yearly report on the status of religious persecution in the world. 22 U.S.C. § 6433 (2006) (authorizing Commission to issue yearly report on religious persecution). The report highlights different incidents of religious persecution each year, but the ultimate message behind the report does not change: religious persecution continues to be an issue of serious concern.

The Commission's 2010 report documents incidents of religious persecution occurring in 28 nations. United States Commission on International

Religious Freedom. *See* United States Commission on International Religious Freedom, Annual Report 2010, *available at* http://www.uscirf.gov/images/annual%20report%202010.pdf. As the Commission recognizes, religious persecution remains a concern for many countries and religions: Coptic Christians, Baha'is, and Muslim minority groups in Egypt; Jews and Catholics in Venezuela; Buddhists and Protestants in Vietnam; and Christians and Muslims in Sudan and India, among many others. *Id.* In one 2010 incident, over 500 people living in a Christian community were killed as part of Nigeria's religious uprisings. *Id.* In another incident in 2009, 900 members of an Islamic sect were killed in conjunction with the sect's attempt to further its mission. *Id.*

Religious minorities such as these and others should not be forced to return to countries where their lives, both religious and otherwise, would be put in peril, until they have an opportunity to exhaust their legal rights. The post-departure bar has the perverse effect of shutting the door to asylum seekers who, despite the desperate nature of their situation, simply desire to utilize the appropriate legal channels for remaining in the United States.

B. This Court Should Resolve an Issue that Affects All Refugees in This Country.

Immigration officials commenced an increasing number of removal proceedings during 2009, as compared to the past four years. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). As immigration officials commence more removal proceedings, the need to protect refugees' rights simultaneously increases. Motions to reopen or

reconsider are one such vital procedural mechanism designed to protect the rights of refugees. Refugees frequently take advantage of the right to file such motions, as refugees filed over 7,000 motions to reopen or reconsider in 2009. *Id.* All refugees should have the right to file a motion to reopen or reconsider, and in doing so, ensure that the BIA determines their motion on the merits, not on jurisdictional grounds.

The administrative adjudicatory system in this country is a model of excellence, but it is not a model of perfection. The procedures mandated by statute are designed to compensate for mistakes and new developments, and provide litigants with additional opportunities to ensure fair adjudication of their claims. Particularly in an asylum case, a refugee should not be forced back to his or her country of origin and face possible danger until our administrative agencies and courts can actually adjudicate the refugee's claim.

II. THE CIRCUIT SPLIT HAS CREATED PRACTICAL CONSEQUENCES THAT REQUIRE THIS COURT'S RESOLUTION.

Refugees who enter the United States should receive equal treatment. Their claims should be adjudicated under the same, predictable standards. The only criteria for deciding a motion to reopen or reconsider should be the merits of the particular motion. Geographic variances should not—as they currently do—dictate whether a motion to reopen will be granted.

The lack of uniformity among the courts of appeals has produced significant confusions. The

current circuit split leaves thousands of immigrants and their similarly confused attorneys, especially those with a national practice, left to play a guessing game. The confusion only further complicates the already challenging maze of immigration laws. *See Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (Cabranes, J.) (noting the "labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); *Castro-O'Ryan v. U.S. Dep't of Imm. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting E. Hull, *Without Justice For All* 107 (1985) (stating that "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'").

Another consequence of the split is the alarming statistical disparities it creates. If the First, Second, Third, Fifth, Tenth, or Eleventh Circuits decided a particular case on this issue, their decisions, in practice, would be identical. An identical but opposite decision would be reached if the Fourth, Sixth, Seventh, or Ninth Circuits decided the same case. Of all asylum claims filed in 2009, approximately 54% were filed in the First, Second, Third, Fifth, Tenth, and Eleventh Circuits and approximately 43% were filed in the Fourth, Sixth, Seventh, and Ninth Circuits. The Courts of Appears involved in this circuit split hear 97% of all asylum claims. Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2009 Yearbook of Immigration Statistics (2010). Because of the split, whether a refugee's motion will be heard is determined by where he or she entered the United States to seek

affirmative asylum or where he or she sought defensive asylum. Thus, the stark split provides arbitrary results for asylum seekers who are at the mercy of whichever region of the United States they happen to enter.

Because the circuits that are split on this issue decide asylum cases at a similar rate, almost half of the refugees in this country are subject to one set of rules, while the other half of refugees are subject to another set of rules. It is both impractical and unfair that identically situated refugees can be made to suffer different consequences based solely on accidental geographic variances. In this area of the law, laden with enormous consequences, consistency in the application of the law is essential. Refugees have a single opportunity to have their claims re-heard: a motion to reopen or reconsider under 8 C.F.R. § 1003.2 (2006). Resolution of these motions should not be based solely on happenstance of geography.

III. THE TENTH CIRCUIT'S READING OF THE REGULATIONS PRODUCES ILLOGICAL CONSEQUENCES.

The Tenth Circuit's holding is fundamentally at odds with the purposes of this country's immigration laws, which in turn reflect America's long tradition as a safe haven from religious persecution. Immigration laws aim to protect those refugees in need of protection, but at the same time, provide a rigid set of guidelines for refugees to follow. Refugees who violate any of an array of laws lose protection from the immigration laws. 8 U.S.C. § 1182(a)(6), (9) (2006) (detailing grounds that prevent

reentry into the United States including prior illegal entry into the United States, failure to appear at removal proceedings, and previous removal from the United States under 8 U.S.C. § 1229a (2006)).

The Tenth Circuit's approach encourages the type of unlawful behavior that the immigration laws seek to prohibit. Under the Tenth Circuit's view, a person who complies with a voluntary departure order loses the right to have the BIA reopen his or her immigration case. The sole avenue, then, for a person in receipt of a voluntary departure order to guarantee the possibility of review is to defy the order and hide in the United States in violation of the law. In other circumstances, a refugee's failure to comply with a departure order would subject the refugee to automatic deportation. It is impractical and illogical, then, that refugees who violate the law are those who may receive review of motions to reopen. It should not be that an asylum seeker has to violate the law in order to seek the law's full protection.

Those who comply with voluntary departure orders, on the other hand, face grave consequences. Compliance with a voluntary departure order subjects a refugee to the same persecution from which he or she initially sought refuge. The asylum laws in this country seek to protect those in need from various types of persecution. By forcing individuals to return to their country of origin, and at the same time surrender their opportunity to seek relief in the Untied States, the Tenth Circuit's ruling undermines the purpose behind asylum and the recognized importance of religious freedom in this country.

In this sense, a voluntary departure order is no different than an involuntary one, because they both compel refugees to leave and put them at risk of returning to the persecution from which they initially sought asylum. Refugees with a pending motion to reopen or reconsider, face a Catch 22: defy the voluntary departure order, remain in the country, seek hiding, and violate the law, or comply with the departure order, leave the country, and forfeit the right have the BIA reopen or review their claims. This Court's resolution is necessary to right this wrong.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

Jeffrey I. Pasek
Counsel of Record
Rachel S. Fendell
Cozen O'Connor
1900 Market Street
Philadelphia, PA
19103
(215) 665-2000
Jpasek@cozen.com
Judah I. Labovitz
Of counsel
1717 Arch Street
Suite 4130
Philadelphia, PA
19103
Attorneys for *amici curiae*